In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-577

BERNARD FEINBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that 18 U.S.C. 3500 does not bar pretrial discovery, under Rule 16, Fed. R. Crim. P., of statements made by him to a prospective government witness during the course of commission of an alleged offense, which were not memorialized in any manner but the witness's recollection.

1. On May 9, 1973, petitioner was charged in a nine count indictment with violating 18 U.S.C. 1341.[1] Prior to trial, petitioner filed a motion for a bill of particulars pursuant to Rule 7, Fed. R. Crim. P., in which he sought dis-

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[1]The indictment charged petitioner with devising a scheme to defraud the citizens of Cook County, Illinois, of duly owed taxes by misrepresenting that developed, income-producing lands that he owned were vacant. The individual mailings upon which each count of the indictment is based, primarily representing items designed to facilitate the misrepresentations, are alleged to have been caused by defendant to be mailed in furtherance of the scheme.

covery of, among other things, any of his oral statements that the government intended to introduce at trial, the name and address of the person to whom it was made, and the date of its utterance. The request for particularization was granted, and the government's motion for reconsideration was denied in a brief memorandum opinion.[2] The government then requested that the district court further reconsider its decision on the ground that its discovery order was precluded by the express language of 18 U.S.C. 3500. On March 1, 1974, the district court denied the motion to reconsider and, treating petitioner's request as one for discovery under Rule 16(a), Fed. R. Crim. P., held that, regardless of whether the procedural vehicle for seeking discovery is Rule 16(a) or Rule 7(f), a defendant is entitled to discover statements that he is alleged to have made to prospective government witnesses during the course of commission of the offense. See 371 F. Supp. 1205 (N.D. Ill.); Pet. App. C.

The government refused to comply with the discovery order, and the district court thereupon ordered the suppression of testimony of prospective government witnesses with regard to statements made to them by petitioner during the course of the alleged offense. The government appealed pursuant to 18 U.S.C. 3731.[3] The court of appeals

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[2]The district court's initial opinion was not published, and it was subsequently superseded by the March 1, 1974 opinion (Pet. App. C).

[3]The district court's order involved four pending cases; appeal was taken by the government in two of those cases: C.A. No. 74-1253, *United States* v. *Bernard Feinberg* (petitioner), and C.A. No. 74-1254, *United States* v. *John C. Thompson.*

affirmed in part[4] but reversed the suppression order insofar as it was based upon the government's failure to furnish petitioner with the substance of his statements to prospective government witnesses. (Pet. App. A).

2. Petitioner's contention that 18 U.S.C. 3500 is not a bar to the discovery, pursuant to Rule 16, of his statements made to prospective government witnesses during the course of an alleged offense was properly rejected by the court of appeals in a comprehensive opinion upon which we rely. As the court below stated (Pet. App. 3A-5A):

> In pertinent part, Rule 16(a)(1) permits the district court to order the Government to permit a defendant to inspect and copy or photograph any relevant "written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government * * *." The Advisory Committee's notes make it plain that the words "to the attorney for the government" modify the phrase "the existence of which is known or by the exercise of due diligence may become known." 8 Moore's Federal Practice, par. 16.01[3] p. 16-5 (2d ed. 1973). Therefore, as held below (371 F. Supp. at 1216), Rule 16(a)(1) is not limited to statements of the defendant made to agents of the Government. *United States* v. *Baker*, 262 F. Supp. 657, 671-672 (D. D.C. 1966); Moore, *supra*, par. 16.01[1] p. 16-38.

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[4]The court affirmed that part of the order that held that a defendant may discover whether a written record of the statements exist, the identity of persons to whom the statements were allegedly made and the date on which they were allegedly made (Pet. App. 2A). These aspects of the district court's order were not directly challenged on the government's appeal (*id.* at 2A-3A).

On the other hand, Rule 16(b) provides in pertinent part that Rule 16 does not authorize the discovery or inspection "of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in" the Jencks Act. Accordingly, it is necessary to refer to the Jencks Act to see if it permits the discovery of defendants' statements made to prospective government witnesses (371 F. Supp. at 1212).

In pertinent part, the Jencks Act provides (18 U.S.C. §3500(a)):

> "In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case."

While we sympathize with broadened discovery in criminal cases, the foregoing statutory provision prescribes [sic][5] pre-trial discovery of statements of government witnesses, including those parts which relate conversations of the defendant. Such statements are not producible under 18 U.S.C. §3500(b) until after a witness called by the United States has testified on a subject matter related to the statements. *United*

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[5]Presumably, the court intended to say "proscribes."

States v. *Wilkerson*, 456 F.2d 57, 61 (6th Cir. 1972), cert. den., 408 U.S. 926; *United States* v. *Kenny*, 462 F.2d 1205, 1212 (3d Cir. 1972), cert. den. *sub nom. Krupke* v. *United States*, 409 U.S. 914; *United States* v. *Dorfman*, 53 F.R.D. 477, 479 (S.D. N.Y. 1971), affirmed, 470 F.2d 246 (2d Cir. 1972).* * *

As noted in *Dorfman*, in excluding pre-trial discovery of oral statements made by defendant to prospective government witnesses, Congress was endeavoring to protect the security of those witnesses. Prohibiting the disclosure ordered here until the witness has testified at trial also protects the integrity of the Government's evidence. Probably these same factors motivated the draftsmen of proposed Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure (presently scheduled to go into effect on August 1, 1975) to limit pre-trial discovery to the "substance of any oral statement which the government intends to offer in evidence at the trial *made by the defendant* whether before or after arrest in response to interrogation by any person then known to the defendant *to be a government agent*" (emphasis supplied) (62 F.R.D. 304-305). Since the proposed rule was intended to give "greater discovery" than before (62 F.R.D. 308), it strongly reinforces our holding that the present rule does not permit the discovery sought.

Petitioner's contentions that he does not seek to discover the statement of a government witness (Pet. 9-11) and that discovery will not affect the integrity of the government's evidence (Pet. 12) are without merit. The fact that a witness's statement may refer to remarks allegedly made by a defendant does not remove that statement from the scope of the Jencks Act. *United States* v.

McMillen, 489 F.2d 229 (C.A. 7); cf. *United States* v. *Percevault*, 490 F.2d 126 (C.A. 2). And as the court of appeals stated (Pet. App. 6A): "* * * ordinarily 'it is "manifestly impossible" to reveal the contents and circumstances of a defendant's statement without revealing the contents of the prospective witness' statement which is forbidden by Section 3500.'"

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1975.